Abdul Rahim bin Abdul Kadir & Anor v Twenty First Century Products Sdn Bhd

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO S2-22-207 OF 1996
KAMALANATHAN RATNAM J
5 NOVEMBER 1998

Contract *— Breach — Delay — Whether there was delay — Oral extension of time — Whether extension must be in writing*

Contract *— Rescission — Sale and purchase of land — Whether unwilling to go through with contract amount to repudiation*

On 23 June 1995, the plaintiffs as vendor and the defendant as purchaser entered into a sale and purchase agreement ('the agreement') in respect of a property ('the property') — which was charged to Bank Pertanian Malaysia — at an agreed purchase price of RM371,000. The defendant was represented by one Mr Sunny Mathews ('the solicitor'). A sum of 10% amounting to RM37,100 was paid. On 21 August 1995, the defendant secured a financing facility for RM296,000. On 28 October 1995, the defendant paid to the plaintiffs the sum of RM37,900 being the differential sum due between the loan sum and the balance of the purchase price. On 21 November 1995, the financiers released the sum of RM35,378.52, being the redemption sum to Bank Pertanian Malaysia. The agreement provided that the balance sum of RM333,900 was to be paid within three months from the date of signing of the agreement and that the vendor could grant an extension of one month ('the extended completion date') to the purchaser. The plaintiffs submitted that pursuant to the agreement, the completion date was 23 September 1995 and the extended completion date would be 23 October 1995. The plaintiffs contended that the defendant had not paid the balance by the extended completion date and thus asked for specific performance of the agreement or in lieu thereof damages. The defendant contended that: (i) the plaintiffs had orally consented to a further extension since there was an erroneous first redemption statement from Bank Pertanian Malaysia and because of this, there was delay; (ii) the plaintiffs had rescinded the agreement and that the defendant had accepted such rescission. On the basis that there was a rescission, the defendant counterclaimed for the payment of the deposit, the redemption sum, the payment of the differential sum and other reliefs.

Held, granting judgment for the plaintiffs and dismissing the defendant's counterclaim:

(1) Although the completion date under the agreement was 23 September 1995, the solicitor only wrote to Bank Pertanian Malaysia to obtain the redemption statement for the first time on 30 September 1995, and subsequently on 6 November 1995, which was long after the extended completion date (see

p 227E-F). Further, in the circumstances of the case, the court could not accept that there was any oral consent given by the first plaintiff to extend time. Also, even if there had been an oral confirmation, such confirmation would have to be rejected in view of cl 16.05 of the agreement which clearly spelt out that such variation to the agreement must be made by the parties in writing (see p 227H). Therefore, there was a delay which amounts to a breach on the part of the defendant in completing the agreement (see p 227H–I).

(2) On the facts, there was no basis to hold that the plaintiffs had rescinded the contract. In any case, being unwilling to go through with the contract is a far cry from repudiating it. On the contrary, the correspondence included in the common agreed bundle of documents indicated the plaintiffs' intention of completing the contract (see p 228A, B–C); *Lim Sin Oo & Ors v Cheah Tjen Siong* [1989] 2 MLJ 44 followed.

[Bahasa Malaysia summary

Pada 23 Jun 1995, plaintif-plaintif sebagai penjual dan defendan sebagai pembeli telah mengikat perjanjian jual beli ('perjanjian tersebut') berhubung dengan sebidang hartanah ('hartanah tersebut') — yang telah digadaikan kepada Bank Pertanian Malaysia — pada harga belian yang disetujui sebanyak RM371,000. Defendan telah diwakili oleh seorang bernama En Sunny Mathews ('peguamcara tersebut'). Wang sebanyak 10% berjumlah RM37,100 telah dibayar. Pada 21 Ogos 1995, defendan telah mendapatkan kemudahan pembiayaan untuk RM296,000. Pada 28 Oktober 1995, defendan telah membayar kepada plaintif-plaintif jumlah sebanyak RM37,900 yang merupakan jumlah perbezaan yang harus dibayar di antara jumlah pinjaman dan baki harga belian. Pada 21 November 1995, pembiaya telah melepaskan jumlah sebanyak RM35,378.52, iaitu jumlah penebusan kepada Bank Pertanian Malaysia. Perjanjian tersebut memperuntukkan bahawa jumlah baki sebanyak RM333,900 hendaklah dibayar dalam tempoh tiga bulan dari tarikh menandatangani perjanjian tersebut dan bahawa penjual boleh memberikan pelanjutan sebulan ('tarikh penyempurnaan yang dilanjutkan') kepada pembeli. Plaintif-plaintif menghujahkan bahawa menurut perjanjian tersebut, tarikh penyempurnaan adalah 23 September 1995 dan tarikh penyempurnaan yang dilanjutkan adalah 23 Oktober 1995. Plaintif-plaintif menghujahkan bahawa defendan telah tidak membayar baki pada tarikh penyempurnaan yang dilanjutkan dan justeru itu meminta pelaksanaan spesifik perjanjian atau ganti rugi sebagai ganti. Defendan menghujahkan bahawa: (i) plaintif-plaintif telah secara lisan memberi kebenaran kepada pelanjutan penyempurnaan selanjutnya oleh kerana terdapat pernyataan penebusan pertama yang salah daripada Bank Pertanian Malaysia dan akibat ini, terdapat kelewatan; (ii) plaintif-plaintif telah

membatalkan perjanjian tersebut dan defendan telah menerima pembatalan sedemikian. Atas dasar bahawa terdapatnya pembatalan, defendan membuat tuntutan balas untuk bayaran deposit, jumlah penebusan, bayaran jumlah perbezaan dan relief-relief lain.

Diputuskan, memberikan penghakiman kepada plaintif dan menolak tuntutan balas defendan:

(1) Walaupun tarikh penyempurnaan di bawah perjanjian tersebut adalah 23 September 1995, peguamcara tersebut hanya menulis kepada Bank Pertanian Malaysia untuk mendapatkan pernyataan penebusan buat kali pertama pada 30 September 1995, dan kemudiannya pada 6 November 1995, yang berlaku lama selepas tarikh penyempurnaan yang dilanjutkan (lihat ms 227E–F). Seterusnya, dalam keadaan kes, mahkamah tidak boleh menerima bahawa terdapat apa-apa kebenaran lisan yang diberikan oleh plaintif untuk melanjutkan masa. Juga, sekalipun terdapat pengesahan lisan, pengesahan itu hendaklah ditolak memandangkan fasal 16.05 perjanjian tersebut yang menyatakan secara jelas bahawa pengubahan sedemikian mestilah dibuat oleh pihak-pihak secara bertulis (lihat ms 227H). Maka, terdapat kelewatan yang kemungkiran pada pihak defendan dalam menyempurnakan perjanjian tersebut membawa kepada (lihat ms 227H–I).

(2) Atas fakta-fakta, tiada dasar untuk memutuskan bahawa plaintif-plaintif telah membatalkan kontrak tersebut. Apa sekalipun, ketidakrelaan untuk meneruskan kontrak adalah jauh berbeza daripada menolaknya. Sebaliknya, surat-menyurat yang termasuk dalam ikatan dokumen yang dipersetujui menunjukkan hasrat plaintif-plaintif untuk menyempurnakan kontrak tersebut (lihat ms 228A, B–C); *Lim Sin Oo & Ors v Cheah Tjen Siong* [1989] 2 MLJ 44 diikut.]

Notes

For a case on delay, see 3 *Mallal's Digest* (4th Ed, 1997 Reissue) para 1642.

For a case on repudiation of a sale and purchase of land agreement, see 3 *Mallal's Digest* (4th Ed, 1997 Reissue) para 2773.

Case referred to

Lim Sin Oo & Ors v Cheah Tjen Siong [1989] 2 MLJ 44 (folld)

S Ashok Kandiah (*A Zahari Kanapathy Thulasi*) for the plaintiffs.

Malek Imtiaz (*Richard KW Chow* with him) (*Teh Joshua Chow & Nurul*) for the defendant.

Cur Adv Vult

Kamalanathan Ratnam J:

FACTS

The plaintiffs as vendor and the defendant as purchaser entered into a sale and purchase agreement dated 23 June 1995 ('the agreement') in respect of a property held under HS (D) 9615, PT 4143 (Lot 10078) Mukim Damansara Daerah Petaling ('the property') owned by the plaintiffs at an agreed purchase price of RM371,000. A sum of 10% amounting to RM37,100 was paid upon execution of the agreement. On 21 August 1995, the defendant secured a financing facility for RM296,000 from Standard Chartered Bank Bhd ('the financiers'). At the time of the execution of the said agreement, the said property was also charged to Bank Pertanian Malaysia. On 28 October 1995, the defendant paid to the plaintiffs the sum of RM37,900 being the differential sum due between the loan sum and the balance of the purchase price. On 21 November 1995, the financiers released the sum of RM35,378.52, being the redemption sum to Bank Pertanian Malaysia. It is also not in dispute that at all material times the defendant was represented by one Mr Sunny Mathews, an advocate and solicitor of the firm of Soraya Chuah & Associates, and that the plaintiffs were not represented by solicitors in respect of the said agreement.

RELEVANT CLAUSES OF THE AGREEMENT

Pursuant to cl 3.02 of the agreement, the balance sum of RM333,900 was to be paid within three months from the date of signing of the agreement. Clause 3.03 of the agreement provided that in the event the purchaser failed or was unable to pay the balance of the purchase price or any part thereof by the completion date, the plaintiff-vendor would grant an extension of one month ('the extended completion date') to the purchaser, provided always that the purchaser should pay the vendor interest on the unpaid amount at the rate of 8% pa calculated on a daily rest basis, commencing from the day following the completion date up to the date of payment of the balance purchase price. Further, cl 4.01 provided that in the event the purchaser defaulted in paying the balance by the extended completion date, the vendor should be entitled to terminate the agreement and to be able to forfeit the 10% deposit paid as agreed liquidated damages for breach of contract by the purchaser but all other monies if any paid by the purchaser towards account of the purchase price should be refunded free of interest, to the purchaser. Clause 11.01 provided that the vendor undertook to deliver vacant possession of the said property to the purchaser upon the vendor receiving the full payment of the balance purchase price together with interest. In the event that the vendor refused to give vacant possession of the property after receiving the full purchase price or if the vendor refused to receive the full purchase price if the purchaser was prepared to give it, it was provided for the purchaser to enforce the agreement by applying for specific performance.

Clause 16.05 provided that the said agreement constitutes the whole agreement between the parties and it was further expressly declared that no variations would be effective unless made by the parties in writing.

PLAINTIFFS' CASE

It was the case of the plaintiffs that since the defendant was required to pay the balance of the purchase price within three months from the date of the said agreement, the completion date thus was 23 September 1995 and the extended completion date would be 23 October 1995. The plaintiffs also contended that the defendant had not paid the balance by the extended completion date and thus asked for specific performance of the agreement or in lieu thereof damages amounting to RM260,621.48 being the balance due from the defendant with interest at 8% on the balance due from 23 September 1995 to 6 May 1996 being the date this writ was issued and further interest at 8% from date of filing of writ to full settlement and costs.

CASE FOR THE DEFENDANT

The defendant through its witness, Mr Sunny Mathews (DW2), contended that the plaintiffs had orally consented to a further extension since there was an erroneous first redemption statement from Bank Pertanian Malaysia and because of this, there was delay. The defendant also argued that it was the duty of the plaintiffs to secure the redemption statement from Bank Pertanian Malaysia. It was also the case of the defendant that the plaintiffs had rescinded the agreement and that the defendant had accepted such rescission. On the basis that there was a rescission, the defendant counterclaimed for the payment of the deposit, the redemption sum, the payment of the differential sum, the payment of the stamp duty, and for the payment of interest to the financiers in respect of the sums paid out towards redemption. The defendant also further claimed for general damages for loss of a bargain.

FINDINGS OF THE COURT

Delay

It is obvious that there was a delay on the part of the defendant in completing the agreement. The first redemption statement received by the defendant's solicitors was dated 5 October 1995. Both parties accept that this was a wrong statement. The second and correct redemption statement dated 30 November 1995 was received on 16 November 1995. Under cross-examination, the first plaintiff was asked that since as at 23 October 1995 no redemption statement had been issued by Bank Pertanian Malaysia, how was it possible for him to expect the balance of the purchase price to be released. To this, the first plaintiff answered that he expected the purchaser to write to Bank Pertanian Malaysia to find out the balance which he had owed to them. This witness also confirmed that the responsibility of the loan transaction which included the arrangement regarding the

redemption exercise, was with the firm of Soraya Chuah & Associates. Whilst confirming that the said solicitors did not write to Bank Pertanian Malaysia for the redemption statement earlier, he confirmed that they did write in only after the first redemption statement was found to have had a mistake and that was on 6 November 1995 (which was long after the extended completion date) and that the second redemption statement was only received on 16 November 1995. The defendant suggested that since the first plaintiff had some knowledge of banking matters being a credit officer in Bank Pertanian Malaysia, he ought to have known of the importance of the redemption statement.

To my mind, that makes no difference. In any case in re-examination, the first plaintiff did confirm that his area of responsibility in Bank Pertanian Malaysia was not related to housing loans.

Responsibility of counsel when acting for both sides

In this case, Mr Sunny Mathews and his firm acted for both parties. It was clearly the onerous task of Mr Sunny Mathews to have advised the plaintiffs of the need to acquire the correct redemption statement on time, if that duty was indeed that of the plaintiffs. In this case, the first plaintiff has categorically stated that it was the duty of the said solicitors. I find as a fact that contrary to what the first plaintiff has said, the firm of Soraya Chuah & Associates did indeed write to Bank Pertanian Malaysia on 30 September 1995 (see CABD 38) for the redemption statement, thus confirming the first plaintiff's assertion that it was the responsibility of the said solicitors to write for the redemption statement. I must also bear in mind that although the completion date under the agreement was 23 September 1995, the defendant's solicitors only wrote to Bank Pertanian Malaysia to obtain the redemption statement for the first time on 30 September 1995 and no explanation for this delay has been proffered. Since the said first redemption statement was incorrect and the correct statement was only obtained well after the time stipulated, I find as a fact that the defendant had been in breach of the agreement.

Oral agreement to extend time

Mr Sunny Mathews testified that the first plaintiff had indeed given an oral consent to extend time. This has been denied by the plaintiffs. If indeed there was such an oral consent, then surely as a prudent act of practice it would have been incumbent upon Mr Sunny Mathews to have confirmed this in writing. This he failed to do. I cannot therefore accept that there was any oral consent given by the first plaintiff to extend time.

In any case in so far as the suit is concerned, even if there had been an oral confirmation, such confirmation would have to be rejected in view of cl 16.05 of the agreement which clearly spells out that no variation to the agreement would be effective unless made by the parties in writing. In the light of this clause, all the more is there the need to reject any suggestion of oral consent, to extend time.

Had the plaintiffs rescinded the contract?

There is no merit in this submission offered by the defendant that the plaintiffs had rescinded the contract. In fact, Mr Sunny Mathews did not testify that the plaintiffs were not willing to go through with the agreement. This clearly contradicts the evidence of DW1, a director of the defendant, who testified that Mr Sunny Mathews had told him on 16 December 1995 that the plaintiffs were unwilling to go ahead with the agreement because of the dispute. If indeed Mr Sunny Mathews had said this to DW1, Mr Sunny Mathews was never asked to corroborate the said evidence. In any case, being unwilling to go through with the contract is a far cry from repudiating it. On the contrary, the correspondence included in the common agreed bundle of documents (CABD) indicate the plaintiffs' intention of completing the contract and delivering vacant possession of the said property upon receipt of the balance of the purchase price inclusive of interest.

As was said by his Lordship Wan Adnan J (as he then was) in *Lim Sin Oo & Ors v Cheah Tjen Siong* [1989] 2 MLJ 44 at p 46A–B:

> An agreement is rescinded only when there is a total abandonment of the whole contract. The parties had continued to negotiate after the issue of the notice and upon the failure of the negotiations the plaintiffs issued another notice. The conduct clearly negatived any intention to abandon the contract. I therefore held that there was no rescission of the agreement.

I find as a fact that there was in this case no intention at all on the part of the plaintiffs to rescind the agreement.

In the circumstances, I give judgment for the plaintiffs and order specific performance of the sale and purchase agreement dated 23 June 1995. The plaintiffs will have the costs of this action. The defendant's counterclaim must, as a result thereof, be dismissed with costs.

Judgment for the plaintiff; counterclaim dismissed with costs.

Reported by Loo Lai Mee